

*United States Court of Appeals
for the Second Circuit*



**INTERVENOR'S
BRIEF**

76-4212

Original

Civil Appeal
Docket No. 76-4212

BRIEF OF INTERVENOR CANDLEWOOD LAKE AUTHORITY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4212

CONNECTICUT LIGHT AND POWER COMPANY,

Petitioner,

CANDLEWOOD LAKE AUTHORITY,

Intervenor,

v.

FEDERAL POWER COMMISSION,

Respondent.

B
PJS

Petition to Review an Order of the
Federal Power Commission

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QUESTION PRESENTED:

Whether the Federal Power Commission can assert licensing jurisdiction over a hydroelectric power plant constructed prior to 1935 on the Housatonic River without adequate evidence as to the navigability of the river?

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Petition to Review an Order of the
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INTERVENOR'S BRIEF

I. STATEMENT OF THE CASE

A. Nature of the Case

This is an action to review and set aside an order of
the Federal Power Commission (FPC) issued on July 23, 1976

asserting its jurisdiction over four license applications, project numbers 2576 (Shepaug), 2604 (Bulls Bridge), 2632 (Rocky River), and 2646 (Stevenson), submitted by the Connecticut Light and Power Company (CL&P). The FPC has required the CL&P to file license applications for the continued operation of these four hydroelectric plants located in the Housatonic River Valley in Connecticut. When these plants were built, neither the FPC nor the power company believed the plants were subject to FPC jurisdiction. In recent years, the FPC has tried to bring under license already constructed hydroelectric power plants (mostly small) which have been operating independently of the FPC.

This brief, filed on behalf of Intervenor, Candlewood Lake Authority, chiefly concerns the FPC's assertion of jurisdiction over one of these plants, the Rocky River Project No. 2632, which was constructed nearly 50 years ago. The case presents a unique problem because the FPC is trying to assert its jurisdiction over a well-developed recreational resource -- Candlewood Lake. Here, not only does the FPC lack any legal basis for asserting jurisdiction over these projects, but the usual policy reasons supporting FPC jurisdiction are wholly inapplicable.

Candlewood Lake

Candlewood Lake is a large artificial lake created by the Rocky River project. It is 11 miles long with about

75 miles of shoreline. From the standpoint of the FPC and the power company, Candlewood Lake is the "upper reservoir" of the power project. In fact, during the fifty years since the lake was created, Candlewood Lake has become the home of many thousands of people. There are five towns around Candlewood Lake with a population between 90,000 and 100,000. Nearly 10,000 people live at the lakeside.

In the intervening years since the Rocky River project was built, Candlewood Lake has been nurtured by the surrounding populations and has become a major recreation area and resource for these people. The five towns bordering the lake, together with the Candlewood Lake Authority, a quasi-governmental agency of these member towns, provide facilities for fishing, boating and swimming with the requisite back-up health and safety services such as police and fire protection, proper roads and access to the lake, traffic control, boat patrols, navigational aids and water quality monitoring and research programs. Candlewood Lake is, in addition, a major watershed in the state and control over its development is essential to state and local planning efforts. Thus, the Housatonic Valley Council of Elected Officials, a regional planning authority operating under state auspices, is developing a Regional Open Space and Recreation plan with a section devoted to Candlewood Lake.

Effect of FPC Jurisdiction

The seemingly routine assertion of FPC licensing jurisdiction over the Rocky River plant takes on a nightmarish aspect to the residents of the Candlewood Lake area. This is because of the FPC requirement that the power company propose a recreation plan, approved by the FPC, for the Candlewood Lake area. This FPC effort to insure that a private company's use of natural resources be balanced by its promotion of recreational opportunity was designed for the usual case where a power project disrupts a wilderness area. But an assertion of FPC jurisdiction in this case would not force a private power company either to preserve the uniqueness of a beautiful, wild, wooded area (cf. Namekagon Hydro Co. v. Federal Power Commission, 216 F.2d 509 (7th Cir. 1954)), or to create a community natural resource. (See Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 614 (2d Cir. 1965).) Instead, in this unique case, the FPC assertion of jurisdiction presents the residents of Candlewood Lake with the spectre of the Federal Power Commission -- an agency whose area of expertise is national energy policy -- and a private power company -- whose competence lies in utility management -- needlessly doing the traditional job of the local government.

Position of Intervenor

The license applications with the embodied recreation plans threaten to disrupt the local communities' ability to perform governmental functions in providing police, fire, traffic control, roads, water and sewage services as well as insuring the sound environmental development of the area. The Candlewood Lake Authority submits that no Congressional purpose would be served by substituting the plan of a private utility company and a federal energy agency for local self-government over an existing recreational resource. Accordingly, the Candlewood Lake Authority opposes this exercise of FPC authority.

B. Course of Proceedings and Disposition Below

The CL&P's license applications for the four projects covered by the FPC order under review here were filed in 1966 and 1967 under protest that the FPC lacked jurisdiction. Then in 1972, prompted by this Court's decision in Farmington River Power Company v. Federal Power Commission, 455 F.2d 86 (2d Cir. 1972) that a hydroelectric power project constructed prior to 1935 need apply for a license only if it were constructed in navigable waters, the CL&P filed an application for withdrawal of the applications. Under Farmington, there was an evident lack of FPC jurisdiction. The Rocky River, Bulls Bridge and Stevenson projects came into existence prior to

1935 (the Rocky River plant was built in 1928). Moreover, the FPC had already held that no license was required with respect to the Shepaug project because the portion of the Housatonic River affected was not navigable. 1/

The agency called for public hearings before an administrative law judge on the jurisdiction issue. The Federal Power Commission staff counsel on behalf of the FPC staff opposed withdrawal of the applications and asserted agency jurisdiction following evidentiary hearings and briefs. The law judge issued an initial decision concluding that the Housatonic River constitutes navigable waters within the terms of §3(8) of the Federal Power Act and that all four plants including the Rocky River plant were therefore subject to the jurisdiction of the Federal Power Commission. 2/ (App. 1466-1499.) CL&P and Candlewood Lake Authority filed exceptions to this decision showing that it lacked

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- 1/ Electric Power Inc., 11 FPC 1548 (1952). Withdrawal of the Shepaug River project application was justified on the grounds that there was no legal or factual basis for a change from FPC's determination. All four projects are located fairly close together. The Bulls Bridge and Rocky River projects are located, respectively, about 53 and 46 miles north of the Shepaug project. The Stevenson project is located about 11 miles downstream. Transcript of FPC hearings (hereafter Tr.) 90-94.
 - 2/ The initial decision correctly determined that an FPC assertion of jurisdiction over the Rocky River plant could not be based on findings under §23(b) that discharges from these plants affect downstream navigation, that electric power is generated by the projects as part of an interconnected interstate transmission system or because of any unauthorized construction of Rocky River plant project works since August 26, 1935.

evidentiary and legal support. The Federal Power Commission issued a brief order affirming and adopting, without discussion, the findings and conclusions of the presiding administrative law judge (App. 1609-1610). Finally, on July 23, 1976, the FPC refused to reconsider. Its order recited that the record shows the Housatonic River to be navigable at least as far upstream as the Bull's Bridge project, but failed to describe the evidentiary support upon which it relies (App. 1625-1626). In fact, there is no adequate basis to support the agency's decision.

C. Statement of Facts and Issues

The license applications filed by the CL&P involve four hydroelectric projects located on the Housatonic River. One of these projects -- the Rocky River project -- created Candlewood Lake over fifty years ago (Tr. 91-93). Since then the lake and the surrounding area has been developed.

The Candlewood Lake Authority is a quasi-governmental agency comprised of the towns bordering the lake -- Brookfield, Danbury, New Fairfield, Sherman and New Milford. These towns have a population of more than 100,000. ^{3/} The Authority is established pursuant to the laws of the State of Connecticut, Section 7-151a, C.G.S.A., 1976. Its objective is to ensure the ecologically and environmentally sound use, care and development of the lake, by acting independently and through

^{3/} The Annual Report, Housatonic Valley Council of Elected Officials, 1972-73 gives a population of 92,329 for 1973. (issued February 15, 1974).

existing authorities such as the towns and regional and state agencies. It intervenes because its interests, the interests of its member towns, and of the residents of the lake are adversely affected by the proposed imposition of a recreation plan if the FPC licensing process is to be extended to the plants involved in this proceeding.

The major issue before this court is whether the Housatonic River is a navigable water of the United States at the points where the plants are located. This is the basis for FPC licensing requirements with respect to the Rocky River plant. ^{4/} The Authority in its brief points out the major deficiencies of the law judge's decision on navigability (adopted by the Federal Power Commission); and it joins in the more detailed factual statement and arguments set forth by CL&P.

II. ARGUMENT: THE RECORD FAILS TO SUPPORT A FINDING THAT THE HOUSATONIC RIVER WAS OR IS USED TO TRANSPORT PERSONS OR PROPERTY IN INTERSTATE COMMERCE

Section 23(b) of the Federal Power Act, 16 USCA §817, provides that a license must be secured from the Federal Power Commission for the construction, operation or maintenance of power project works "across, along or in any of the navigable waters of the United States." The term navigable waters is

4/ Various alternative bases for jurisdiction over the Shepaug and Stevenson plants proposed by the law judge also fail to meet appropriate legal and evidentiary standards.

defined in Section 3(8) of the Federal Power Act, 16 USCA §796(8) as follows:

"[T]hose parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

The decision adopted by the agency found that the Housatonic was navigable because it "was used and was and is suitable for use in the transportation of persons or property in interstate or foreign commerce." ^{5/} However, the record fails to support this determination.

A. The Law Judge Admitted That the Supporting Record Was Weak

The Commission had the burden of showing that each of the projects is subject to FPC jurisdiction and it failed to

^{5/} Initial Decision as to Federal Power Commission, filed August 19, 1975 (hereafter I.D.) p. 22 (App. 1488). A river is a "navigable water" for the purposes of §3(8) "if (1) it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements." Rochester Gas and Electric Corp. v. Federal Power Commission, 344 F.2d 594, 596 (2d Cir. 1965). No party contended that the river is or could be used for navigation at these points today; nor is there an issue involving improvements.

satisfy that burden. Even the presiding law judge acknowledged that the record supporting the finding of navigability was weak. He observed: "it cannot be said that the evidence either pro or con is overwhelming." (I.D., p. 18, App. 1484). This frank admission is an important indication that the FPC staff did not sustain its burden of providing substantial probative evidence of navigability, particularly in light of the law judge's further acknowledgement of the difficulties of demonstrating a negative, i.e. that the river had not been used nor was or is it capable of use in commerce. ^{6/}

B. There is No Evidence of Commercial Use of the River for Transportation

Evidence of commercial use for transportation is the primary test of navigability, ^{7/} and there is no evidence of such commercial boating on the river. Indeed, the only trained historian who testified in this proceeding, Dr. Christopher Collier, concluded, after an extensive, professional search for evidence concerning the navigability of the river that there was no convincing evidence of commercial navigation on the Housatonic River above Derby (Tr. 132-133). ^{8/}

6/ I.D., p. 7 (App. 1472).

7/ United States v. Appalachian Electric Power Co., 311 US 377 (1940).

8/ The presiding law judge accepted this determination; he did not find that the river was used for commercial boating (I.D., pp. 18-22, App. 1484-88).

In sharp contrast to evidence of commercial boating -- (see, e.g. the evidence relied upon in such leading cases as United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940)), the agency decision rests on a few reports of boating trips of which the most significant is the tale of an admittedly hazardous and unique adventure undertaken in 1883 by two explorers who fought their way down the river using a small, flat-bottomed row boat. The use of the river for boat travel is relevant only to show its susceptibility to commercial use. Yet, the very account of this exploratory trip (Exhibit 21, App. 916-952) confirms that the river could not be used commercially and that it was and is non-navigable.

C. There is no Evidence of Substantial Logging

Where evidence of logging has been relied upon in prior court and FPC cases to establish the navigability of a river, the evidence has shown repeated and substantial logging operations and the fact of logging operations was established by unassailable records. Typically, as in State of Wisconsin v. Federal Power Commission, 214 F.2d 334 (7th Cir. 1954), the evidence established when logging occurred; the extent and value of the lumber involved; ^{9/} and how the operations occurred in the river. In sharp contrast to the substantial

^{9/} "[O]ne operator in 1895 cut and drove down river over 40,000,000 feet of pine...." (214 F.2d at 336).

evidence customarily relied upon, the initial decision here cites stray mentions of a "mast swamp," a few generalized references to logging, or to a sawmill or two on the river found in historical documents of varying credibility 10/ and significance. 11/ These do not add up to the kind of

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- 10/ Exhibit 33 (App. 1009) on which the initial decision repeatedly relies (I.D., pp. 9, 12, 19, 21, 22; App. 1475, 1478, 1485, 1487, 1488) to show that logging and boating activities took place on the river is an example of the doubtful probative value of such evidence. It was introduced by FPC counsel, over objection (Tr. 738), and purported to be a newspaper or magazine article. Its sponsors could only speculate as to where and when it was published or whether it was complete. The presiding law judge agreed to receive this in evidence only "with considerable reluctance" and assured the parties "that the weight I will give it will be affected by the reluctance with which I receive it." (Tr. 738)
- 11/ Contrast, e.g., the evidence substantiating logging activities in Citizens Utilities Co., 21 FPC 233, 238 (1959) (a case which the reviewing court affirmed on other grounds, apparently uneasy about the FPC's finding of navigability in *Citizens Utilities Company v. Federal Power Commission*, 279 F.2d 1 (2d Cir. 1960)):

"A number of elderly witnesses testified in the hearings as to log drives down the Clyde in times past, both for lumber and for pulp. This testimony and contemporary newspaper articles include accounts of such downstream movements in 1887, 1890, 1890-1897 (approximately), 1893, 1898, 1900, 1909-1910, 1916-1917, 1918. For instance, one of the witnesses testified that he sold 2200 to 2300 cords of pulp logs to the Prouty mill in each of the last two years of its operations, that is in 1916 and 1917, or 1917 and 1918. The wood was cut as far up as Mad Brook at mile 21.3, piled on the flats close to the river and put in the river during the spring run-off in March. The logs were gathered in a boom at Salem Pond, moved through the pond, and were eventually delivered to the Prouty mill at mile 1.8, a distance of about 20 miles. There were apparently no runs of logs in the river since 1918, although the river was used in 1935 to transport several hundred spruce, fir and cedar poles for electric and telephone use."

substantial, specific evidence of commercial logging operations which are prerequisite to a finding of navigability.

D. The Materials Relied Upon Lack Probative Value

The agency relies on historical materials for evidentiary support. Reliance on historical works to provide evidence of commercial navigation is permitted only if the "historical works [are] generally considered authentic." 12/ Such evidence must also be substantial. 13/ Notwithstanding the difficulties of otherwise proving navigability, the courts have been wary of uncritical reliance on secondary sources, particularly where little documentation exists for the historical periods and this evidence is contradicted by evidence of the physical characteristics of the river. 14/ In this case, despite extensive research by many parties, the relied upon evidence of "navigation" on the Housatonic is speculative and scanty and wholly fails to provide any substantial probative evidence on which FPC licensing jurisdiction could rest.

Footnote continued

Despite the diligent search of a trained researcher, there was no such evidence here. Indeed, in *Citizens Utility*, this detailed evidence was only a part of the body of evidence of logging.

12/ *Montana Power Co. v. Federal Power Commission*, 185 F.2d 491, 498 (D.C. Cir. 1950).

13/ *Ibid.*

14/ *State of Oklahoma v. State of Texas*, 258 U.S. 574, 586-87 (1922). Here the physical evidence negates any possibility that the river was navigable. See below at p.16.

Much of the wisps and shreds of historic material relied upon to support the finding of navigability -- such as speculated Indian use and the location of a fur trading post 15/ -- as well as much of the inferences of logging activity 16/ -- lack probative value. Moreover, these relate to activities even before the United States was established which, as CL&P shows, should not be considered as evidence that the river was used for transportation in interstate commerce. 17/

15/ Assertions of use of the river for trade are based on inference compounded on inference. For instance, the fact that a fur trading post was located on an island in the river is no indication that the traders traveled up and downstream in ways which meet the standards for determining navigability, i.e. using it as a continued highway of commerce. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 406 (1940). Congress never intended that a finding of navigability could be based on evidence which establishes no more than that fur traders had to travel a hundred feet or so from shore by boat.

16/ The sole primary account concerning logging activities is Exhibit 33, App. 1009, evidence which the presiding law judge agreed could be given limited, if any, weight. (P. 12, ftn. 10, *supra*.)

17/ It should be observed that in prior cases where the use of a river by Indians or traders or settlers was noted, there was substantial evidence of post-Revolutionary use of the river for commercial purposes. See *The Montello*, 87 U.S. 430, 440-41 (1874):

"In more modern times, and since the settlement of the country ... a large interstate commerce has been successfully carried on This was done by means of Durham boats, which were vessels from seventy to one hundred feet in length, with twelve feet beam, and drew when loaded, two to two and one half feet of water. These boats ... would readily carry a very considerable tonnage." That commercial use of the river occurred in 1838.

Only recently, this Court struck down an FPC finding of navigability which was based on similar inferences and speculation. Rochester Gas and Electric Corporation v. Federal Power Commission, 344 F.2d 594, 598 (2d Cir. 1965). The court explained that such inferences did not constitute a sufficient basis supporting FPC jurisdiction:

"With all due allowance for the Commission's expertise, we cannot agree that these inferences were supported by substantial evidence." 344 F.2d 598

Footnote continued

See also, Bellows Falls Hydro-Electric Corp., 2 FPC, 380, 383 (1941) ("Between 1802 and 1857, boats in large numbers, carrying thousands of tons each year (between 2,000 and 10,000 tons ..."); Wisconsin-Michigan Power Company, 3 FPC 449, 451 (1943) (e.g., "An early timber cruiser descended the ... River in 1873 in a flat-bottomed bateau (one of the flotilla of eight bateau) described as large enough to carry five men and their supplies and equipment...."); Economy Light & Power Co. v. United States, 256 U.S. 113, 117 (1921) (used by fur traders -- "a leading branch of commerce" in the area -- "down to the end of the first quarter of the nineteenth century"; boats "capable of carrying several tons each, and manned by crews of six or eight men" were employed.) Furthermore, even if evidence of pre-Revolutionary activities is to be taken into account at all -- and it would only be relevant to the issue of possible commercial use of the river centuries later -- the cited evidence is so weak and so remote to the relevant time period, that it could lend little substance to a finding of navigability, much less be its major support.

E. The Record Conclusively Shows that the Housatonic River is not Suitable for Navigation

The facts which are clearly established in the record negate the possibility that the river was or is capable for use in commerce. The Army Corps of Engineers, and other official studies, ^{18/} conclusively show that the physical characteristics of the river preclude its use for navigation, either improved or unimproved. Indeed, the agency decision conceded that the "multiplicity" of improvement schemes for the river which were proposed "without effectuation, argues against their practicality." (I.D., p. 23, App. 1489).

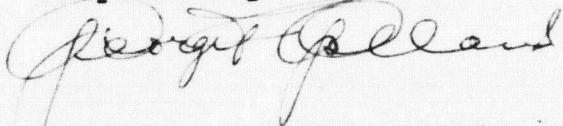
III. CONCLUSION

The record in the proceedings before the Federal Power Commission fails to demonstrate that the Housatonic River is a navigable water of the United States at the points where the four power projects are found or to support any other basis for agency jurisdiction over these projects.

18/ A particularly striking illustration of why the Housatonic is not suitable for navigation is a comparison of the exceedingly sharp gradients of the Housatonic at the plants with the gradients of another river found suitable for logging in Wisconsin Public Service Corporation v. Federal Power Commission, 147 F.2d 743 (7th Cir. 1945). The initial decision chooses to ignore these physical facts focusing instead on reports of boating adventures which even if true, fail to meet the applicable standard, i.e., that "the natural navigation of the river is such that it affords a channel for useful commerce." The Montello, 87 U.S. 430, 443.

Accordingly, Intervenor Candlewood Lake Authority respectfully requests that the agency decision be rejected and that CL&P's petition for withdrawal of licensing application be granted.

Respectfully submitted,



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December 28, 1976

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition to Review an Order of the Federal Power Commission on all parties of record by first class mail, postage prepaid this 23rd day of December, 1976.

Olga Laskin